

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CITY OF SAN DIEGO)	File No. 0000655923
)	
Petition for Reconsideration and Request for)	
Waiver of Section 101.147 of the Commission's)	
Rules)	

ORDER ON RECONSIDERATION

Adopted: October 15, 2002

Released: October 17, 2002

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Petition for Reconsideration (Petition) filed by the City of San Diego (San Diego) on May 30, 2002.¹ The Petition asks that we reconsider our May 1, 2002 denial² of the Request for Waiver of Section 101.147 of the Commission's Rules³ filed by San Diego on November 13, 2001 to obtain authorization on a primary basis in the 17.7-19.7 GHz band (18 GHz band) Fixed Microwave Service (FMS) for a new station to replace expired FMS Station WJY47, San Diego, California.⁴ In the alternative, the Petition requests that we "grant a modified Request for Waiver permitting secondary status in lieu of primary basis for 19015 MHz."⁵ For the reasons discussed below, we grant the Petition in part and deny it in part. Specifically, we will issue San Diego a new license authorizing it to operate on frequency 19015 MHz on a secondary basis to Fixed Satellite Service (FSS) and Mobile Satellite Service (MSS) systems.

II. BACKGROUND

2. The Commission has reallocated portions of the 18 GHz band from terrestrial fixed services (FS), including the FMS, to satellite services.⁶ To this end, the Commission has adopted certain

¹ City of San Diego, Petition for Reconsideration (filed May 30, 2002) (Petition).

² City of San Diego, *Order*, 17 FCC Rcd 8005 (WTB PSPWD 2002) (*Order*).

³ 47 C.F.R. § 101.147.

⁴ See FCC File No. 0000655923 (application), Attachment 1 (Request for Waiver of Section 101.147 of the Commission's Rules) (filed Nov. 13, 2001) ("Waiver Request"). The license for Station WJY47 expired on October 31, 2000. The application was processed to the extent that San Diego also sought authorization to operate in the 6 GHz band. See *Order*, 17 FCC Rcd at 8007-8008 ¶ 6; License for Station WPUV826, File No. 0000655923 (issued May 13, 2002).

⁵ Petition at 1.

⁶ See Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3 -17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, *Report and Order*, IB Docket (continued....)

transition rules.⁷ In doing so, the Commission balanced the needs of incumbent FS licensees to continue operating their systems with the need to conserve vacant 18 GHz band spectrum for use by satellite licensees, to provide satellite licensees with the flexibility to establish new services, and to preclude satellite licensees from bearing any unwarranted additional costs in relocating FS licensees.⁸ Thus, rather than immediately clearing the entire 18 GHz band of the incumbent FS users, the Commission permits the incumbents to continue to occupy portions of the band on a co-primary basis with the FSS and MSS licensees for a significant length of time, by the end of which the incumbents are to relocate to other spectrum.⁹ FSS and MSS licensees have the option, however, of requiring the FS and FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.¹⁰ In addition, we authorize extensions and major modifications of existing FS systems only on a secondary basis to FSS and MSS systems.¹¹ Most minor modifications of FS stations are also authorized on a secondary basis unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the FSS or MSS licensees.¹² The result is that while incumbent FS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status. Also, no new FS licenses will be granted in the 18.58-19.3 GHz portion of the 18 GHz band.¹³

3. As noted in the *Order*, San Diego was an incumbent licensee operating Station WJY47 on a primary basis when the Commission adopted and released the *18 GHz Report and Order*. Station WJY47 was authorized for paths on frequencies 1975 MHz, 1985 MHz, 6735 MHz, 6755 MHz, and

(Continued from previous page)

No. 98-172, 15 FCC Rcd 13430 (2000) (*18 GHz Report and Order*). The satellite services operating in the 18 GHz band consist of both the FSS and the MSS.

⁷ See 47 C.F.R. §§ 101.83-101.97. The rules are intended to protect the incumbent FS and FMS licensees in the 18 GHz band “to the maximum extent possible while at the same time providing for the growth of both satellite and terrestrial services.” *18 GHz Report and Order*, 15 FCC Rcd at 13432 ¶ 2; see also *id.* at 13470 ¶ 82 (noting that the adopted rules should lead to efficient relocation and thereby serve the public interest).

⁸ See *18 GHz Report and Order*, 15 FCC Rcd at 13460-70 ¶¶ 61-84.

⁹ See 47 C.F.R. §§ 101.85, 101.95; see also *18 GHz Report and Order*, 15 FCC Rcd at 13460-67 ¶¶ 61-75. With the exception of incumbent licensees in the 19.26-19.3 GHz band, FS and FMS licensees have until June 8, 2010 – ten years from the adoption of the *18 GHz Report and Order* – to relocate. See *18 GHz Report and Order*, 15 FCC Rcd at 13462-65 ¶¶ 65-72. Incumbent FS and FMS licensees in the 19.26-19.3 have until October 31, 2011 to relocate. See Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, *First Order on Reconsideration*, IB Docket No. 98-172, 16 FCC Rcd 19808, 19820-19821 ¶ 25 (2001) (*18 GHz Reconsideration Order*).

¹⁰ See 47 C.F.R. §§ 101.85(a), 101.89-101.99.

¹¹ See 47 C.F.R. §§ 101.83, 101.97. Secondary operations may not cause interference to operations authorized on a primary basis and are not protected from interference from primary operations. Thus, an incumbent operating on a secondary basis must cease operations if it causes interference to an FSS or MSS licensee.

¹² See 47 C.F.R. § 101.97; see also *18 GHz Report and Order*, 15 FCC Rcd at 13460-70 ¶¶ 61-84.

¹³ See 47 C.F.R. § 101.147(r).

19015 MHz.¹⁴ San Diego's license for Station WJY47 expired on October 31, 2000.¹⁵ On November 13, 2001, San Diego filed an application for a new license seeking authorization to operate on frequencies 6735 MHz, 6755 MHz, and 19015 MHz.¹⁶ The application included a request for waiver of Section 101.147(r) of the Commission's Rules to retain primary status for the continued operation of frequency 19015 MHz.¹⁷

4. On May 1, 2002, the Division denied San Diego's Waiver Request. We reminded San Diego that the Commission's Rules specifically require that such waiver requests include "a complete explanation as to why the waiver is desired."¹⁸ In so doing, we emphasized that San Diego's only explanation for requesting a waiver was based on the fact that it "mistakenly allowed" its license to expire.¹⁹ As such, we concluded that San Diego's failure to file a timely renewal application for Station WJY47 did not provide a sufficient basis for granting a waiver of Section 101.147(r) of the Commission's Rules under the circumstances presented.²⁰ Rather, we reiterated that it is the responsibility of the licensee to know the term of its license and to file a timely application to renew its authorization prior to expiration.²¹ We therefore denied the Waiver Request.²² San Diego timely filed the instant Petition on May 30, 2002.

¹⁴ San Diego was first licensed to operate Station WJY47 in 1972 and renewed or modified its license seven times prior to its expiration on October 31, 2000. In 1993, San Diego modified Station WJY47 to add frequency 19015 MHz.

¹⁵ The Commission, as a courtesy, mailed a renewal reminder to San Diego on August 6, 2000. However, San Diego failed to file a timely renewal application, resulting in the expiration of the license on October 31, 2000. In the instant Petition, San Diego states that, to date, it has not been able to locate that reminder. *See* Petition at 2 n.6.

¹⁶ *See* FCC File No. 0000655923 (filed Nov. 13, 2001) (application).

¹⁷ *See* FCC File No. 0000655923, Attachment 1 (Request for Waiver of Section 101.147 of the Commission's Rules) (filed Nov. 13, 2001) (Waiver Request).

¹⁸ *Order*, 17 FCC Rcd at 8007 ¶ 5 (*quoting* 47 C.F.R. § 1.925(b)(2)) (other internal citations omitted).

¹⁹ *See Order*, 17 FCC Rcd at 8007 ¶ 5.

²⁰ *See id.* The Division explained that a licensee's inadvertent failure to renew its license in a timely manner is not a unique or unusual circumstance that would render application of the rule in question inequitable, unduly burdensome, or contrary to the public interest. *See id.* (internal citations omitted).

²¹ *See id.* (*citing* 47 C.F.R. § 1.949; Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, Docket No. 98-20, 14 FCC Rcd 11476 (1999)).

²² *See Order*, 17 FCC Rcd at 8007 ¶ 6. Absent a waiver, 47 C.F.R. § 101.147(r) precludes the authorization of a new Part 101 license in the 18.58-19.3 GHz band and thereby rendered San Diego's application defective with respect to its requested use of frequency 19015 MHz. However, the application was processed with respect to San Diego's requested use of 6 GHz paths. *See Order*, 17 FCC Rcd at 8007-8008 ¶ 6; License for Station WPUV826, File No. 0000655923 (issued May 13, 2002).

III. DISCUSSION

5. The instant Petition argues, pursuant to Section 1.106(c)(2) of the Commission's Rules,²³ that the public interest requires us to take into consideration additional facts that were not previously presented by San Diego in the Waiver Request.²⁴ Specifically, San Diego alleges that its authorization to operate on frequency 19015 MHz expired on October 31, 2000 due primarily to the misrepresentation of a former employee.²⁵ Based on the additional information, San Diego requests that we either (1) grant the instant Petition, reverse our prior denial of the Waiver Request that it filed on November 13, 2001, and process its application²⁶ seeking authorization to operate on a primary basis on frequency 19015 MHz; or, in the alternative, (2) grant a "modified Request for Waiver permitting secondary status in lieu of primary basis for [frequency] 19015 MHz."²⁷

6. To the extent that the Petition relies on facts that San Diego failed to previously present to the Division, we find that the public interest requires our consideration of the information at this time. In particular, we deem it significant that public officials attest to the fact that a former city employee affirmatively misrepresented the status of San Diego's licenses and thereby interfered with the licensee's efforts to keep its license for Station WJY47 current.²⁸ We also note San Diego's declaration that continued operation of a path served by frequency 19015 MHz is crucial to the government's ability to provide the public with timely access to emergency services in outlying coastal communities.²⁹ We therefore believe that it would be in the public interest for us to consider this information in the context of San Diego's Waiver Request.

7. Pursuant to Section 1.925 of the Commission's Rules, we may grant a waiver if it is shown that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁰ For the reasons discussed below, we grant, in part, and deny, in part, San Diego's requested waiver of Section 101.147(r) of the Commission's Rules.

8. San Diego contends that unique circumstances render application of Section 101.147 of

²³ 47 C.F.R. § 1.106(c)(2).

²⁴ See Petition at 1. San Diego does not contest the veracity of the *Order* in this matter and recognizes that it bore full responsibility for renewing its license prior to expiration. See, e.g., Petition at 2.

²⁵ See *id.* at 1-3.

²⁶ See FCC File No. 0000655923 (filed Nov. 13, 2001) (application).

²⁷ Petition at 1.

²⁸ See Declaration of Susan J. Levine in Support of Petition for Reconsideration of City of San Diego (May 30, 2002) ("Levine Declaration") (Deputy Director of the Information Technology and Communications Department for the City of San Diego); Declaration of Ken Norton in Support of Petition for Reconsideration of City of San Diego (May 30, 2002) ("Norton Declaration") (Associate Communications Engineer for the City of San Diego).

²⁹ Petition at 4-5.

³⁰ 47 C.F.R. § 1.925(b)(3).

the Commission's Rules contrary to the public interest.³¹ San Diego emphasizes that the deliberate misrepresentation of an employee precipitated the expiration of the license. According to San Diego, the city employee responsible for prosecuting renewal applications before the Commission ignored our courtesy renewal reminders³² and misled supervisors as to the status of San Diego's licenses, including that for Station WJY47.³³ San Diego notes that, absent the misrepresentation of the employee, its licensing record demonstrates its diligence and history of compliance with the Commission's Rules.³⁴ In this respect, San Diego highlights the fact that it operated Station WJY47 for twenty-eight years without incident or complaint.³⁵ In addition, San Diego stresses the critical importance of its continued use of frequency 19015 MHz in providing for the public safety. San Diego relies on its communications network to interconnect all public safety and public service radio and data systems within the city.³⁶ In particular, San Diego states that the subject frequency is unique and essential for direct communication between the San Diego coastal communities of Point Loma and Pacific Beach.³⁷

9. In this instance, we realize that the employee's misrepresentations as to the status of Station WJY47 compounded San Diego's difficulty in seeking renewal or reinstatement of the license.³⁸ At the same time, however, it appears San Diego lacks any formal process for maintaining its licenses and for ensuring compliance with the Commission's Rules. Rather, San Diego historically relied on the Commission's courtesy reminder to renew its license because it did not have a license management system of its own.³⁹ According to San Diego, "[u]pon receipt of this notice, the employee was charged with the responsibility of processing the renewal license. This system worked well for a number of years."⁴⁰ The Commission has repeatedly found that a licensee cannot rely on the receipt of a courtesy

³¹ See Petition at 3-7.

³² San Diego notes that, to date, it has not been able to locate our courtesy reminder to renew its license for Station WJY47. See Petition at 2 n.6. We therefore assume that the reference to the employee in question not acting on "renewal notifications received . . . by him using" ULS applies to reminders to renew other licenses held by San Diego. See Norton Declaration, ¶ 7.

³³ See Petition at 2; Norton Declaration, ¶ 5; Levine Declaration, ¶ 3.

³⁴ See Petition at 3-7.

³⁵ See *id.* at 3-4.

³⁶ See *id.* at 4-5.

³⁷ See *id.* at 5.

³⁸ We note that, even though San Diego realized the problem shortly following the employee's retirement in September of 2001, it did not seek authorization to operate on frequency 19015 MHz until November 13, 2001. According to the Petition, San Diego thereafter retained the services of Comsearch to process the application, and "Comsearch failed to set forth any facts explaining why the City was Requesting a Waiver." Petition at 3. However, the Waiver Request was signed by Mr. Ken Norton, Associate Communications Engineer for the City of San Diego. Moreover, the Petition fails to explain San Diego's reluctance to raise these matters before the Commission at any time since it filed its application and Waiver Request on November 13, 2001.

³⁹ Petition at 3-4.

⁴⁰ *Id.* at 2.

reminder to ensure license renewal.⁴¹ Under the circumstances, prudence dictates that San Diego adopt procedures to protect against similar occurrences in the future.

10. We believe that the public interest would be served by according San Diego authority to operate on frequency 19015 MHz on a secondary basis to FSS and MSS systems. San Diego contends that, absent the continued use of the subject frequency, “devices would fail in their requirement to relieve traffic congestion and provide for the timely access of emergency services to the areas.”⁴² However, in this respect, we note that San Diego concedes that secondary status would maintain the integrity of its communications network and thereby promote public safety.⁴³ San Diego notes that, if the instant Petition seeking authorization to operate on frequency 19015 MHz on either a primary or secondary basis is denied, it will need to apply for new frequencies.⁴⁴ However, San Diego contends that suitable replacement frequencies may not be available, that its current equipment may not be capable of being retuned, that replacement equipment may be necessary, that retuning or purchasing new equipment will be expensive and time-consuming, and that either action would place an undue burden on the public. We therefore find that a limited waiver is warranted under the circumstances presented by San Diego in this matter. We further conclude that our grant will not adversely affect or impose additional costs on FSS and MSS licensees in the 18 GHz band.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.106, 1.925 and 101.147 of the Commission’s Rules, 47 C.F.R. §§ 1.106, 1.925, 101.147, the Petition for Reconsideration filed by the City of San Diego on May 30, 2002 IS DENIED IN PART AND GRANTED IN PART to the extent indicated above, and a new license for Station WJY47 will be issued authorizing the use of frequency 19015 MHz with secondary status.

⁴¹ See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 26, 27, 80, 87 90, 95, 97 and 101 of the Commission’s Rules to Facilitate the Development and the Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21071 ¶ 96 (1998); Wireless Telecommunications Bureau to Begin Use of Universal Licensing System (ULS) for Microwave Services on August 30, 1999, *Public Notice*, 14 FCC Rcd 12393, 12404 (1999); Tampa Electric Company, *Order*, 15 FCC Rcd 21344, 21348 ¶ 9 (WTB PSPWD1999) (rejecting the “notion that a licensee’s obligation to file a renewal is dependent upon the Commission’s sending a renewal notice to the licensee”).

⁴² Petition at 5.

⁴³ *Id.* at 7.

⁴⁴ See *id.* at 5 (“the City cannot be without the path regardless of its assigned frequency”).

12. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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